

TESTIMONY OF WILLIAM N. BROWNSBERGER

BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
APRIL 12, 2005

Mr. Chairman, Mr. Scott, thank you for inviting me to testify today.

I understand that I owe this honor primarily to my research on the application of school zone sentencing laws in the State of Massachusetts and to related research that I have done over the past ten years on the profile of anti-drug law enforcement in Massachusetts.

Additionally, I have served as a Massachusetts Assistant Attorney General in Narcotics and Special Investigations and have enforced the anti-drug laws of our commonwealth. I presently am a defense attorney, often representing persons charged under those laws. Defense and prosecution are both roles that I am proud of and that provide me with perspective of possible value to the subcommittee.

The sections of the bill intended to protect vulnerable persons lead to universal penalty enhancement for drug dealing.

In 2001, I completed a study of 443 drug dealing incidents in three cities in Massachusetts – New Bedford, Fall River and Springfield – focusing on the use of the school zone anti-drug law in Massachusetts.

The Massachusetts statute defines enhanced penalty zones of 1000 feet around parcels enclosing schools and 100 feet around parks and playgrounds. The zones around schools create most of the impact.

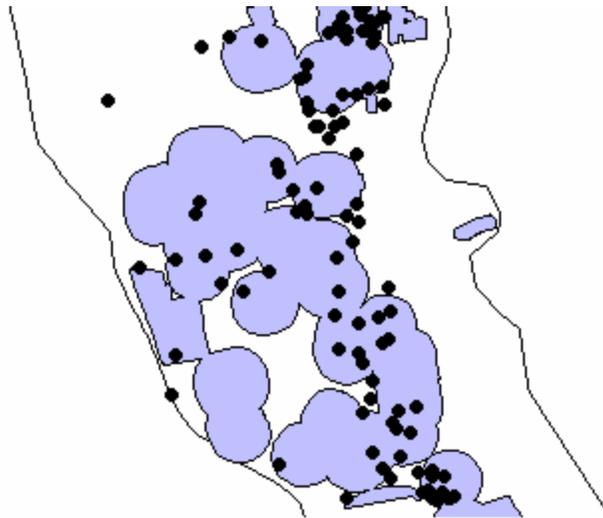
One incidental finding of that study was that less than one percent of the incidents in that sample involved dealing to minors. This result stands to reason: minors typically have less money than adults and are not good customers for drug dealers. Accordingly, I believe that Sections 2(a) and 2(b) of the bill, which enhance penalties for sales to minors, are unlikely to have great practical impact.

Sections 2(c), 2(d) and 4(a) of the bill, are, by contrast, of considerable practical impact – they will expand intended drug-free zones carrying the penalty enhancements for dealing to cover most urban areas in the United States.

A second finding of the study that I mentioned before was that a large portion of the subject cities were covered by school zones – 29% for all three cities combined. It was striking that in the extreme poverty areas of the city, 56% of the neighborhoods were enclosed in school zones. And, in fact, 80% of the drug dealing in the communities occurred in school zones, reflecting the density of schools in the populated areas where people live and do business.

As shown in the figure below, the physical patterning of school zones in the downtown areas is so chaotic that it is intuitively obvious that no drug dealer would know where to stay away from. Our analysis showed that, in fact, drug dealing was denser near schools than further away from them.

Downtown Area Including 155 of 180 (86%) Sample Dealing Incidents in New Bedford



However, our work also showed that, of dealing incidents occurring in school zones, approximately three quarters occurred when school was not in session – on weekends, at night or during the summer. The density near schools did not involve sales to minors, simply the layout of neighborhoods.

The conclusion of our study was that the school zone law in Massachusetts served primarily to enhance penalty levels generally, but did little to accomplish the express purpose of the legislation – to move dealers away from schools. If the goal is to move dealers away from schools, it would be more effective to use a much smaller radius, which would give dealers a real guideline to avoid.

Certainly the same conclusions apply to the present legislation. It expands the federal 100-foot zone around youth centers, public pools and video arcades to 1000 feet and adds public libraries and day care facilities. Section 4 further adds properties comprising drug treatment facilities and programs, including individual treatment providers, to the list of entities with drug free zones around them. A moment's reflection will show the staggering breadth of this bill – any social worker or psychologist providing drug treatment may create another drug-free zone.

The bill takes a further step towards creating universally enhanced penalty exposure for drug dealers in Section 4(b) by establishing special penalties for dealing to anyone who is or has previously enrolled in a drug treatment program or facility. Given the broad

definitions of treatment facilities and programs, most drug users are likely to meet this criterion.

If a universal penalty enhancement for drug dealing is intended, the indirect approach taken by this bill is very costly and inefficient.

Prosecutions under this bill will require proof a number of different elements additional to the basic crimes of drug dealing.

The geographic penalty enhancements introduce four additional proof requirements – proof of the exact location of the incident, proof of the exact location of a particular facility, proof as to the nature of the facility and proof of a measurement from one to the other. In every prosecution, both law enforcement and defense investigators have to make their own measurements to verify the zone and this may be a subject of testimony at trial.

Even more problematic will be the development of proof as to the drug treatment histories of individual drug buyers, necessary for prosecutions under Section 4(b). The buyers will usually have a legitimate 5th amendment privilege to assert if called to testify (even if they have already been convicted of possession in the incident, they may have a privilege to avoid prosecution on conspiracy charges). Access to their present enrollment will be restricted by confidentiality protections, and, of course, prior treatment history will be all but impossible to ever determine.

Universal penalty enhancement for drug dealing is unnecessary and ill-advised.

The often documented and unfortunate truth is that most people going to prison for drug dealing offenses are young black and Hispanic men. In Massachusetts, where only 4.6% of the population was black and 4.6% Hispanic, in the mid-90s, 83% of the young men committed to state prison for drug dealing offenses were black or Hispanic.

I did the research establishing this fact in Massachusetts in 1997. I became a defense attorney a few years later, in part because I wanted to the opportunity talk to these young men and find out who they really were. What I have found is that while some are angry and violent, many are intelligent and decent-natured young men who simply never considered any lawful alternative source of income. Most of their friends and family members are involved in the criminal justice system.

In minority populations in poverty areas, the rates of experience of incarceration among males approach 50 percent by age 40. It seems highly unlikely that lengthening prison terms will enhance the deterrent effect of the law.

The worthy goals of this legislation are best accomplished by more intelligent street law enforcement and drug treatment per se.

Bibliography

Brownsberger WN, et al. 2001, 2004. *An Empirical Study of the School Zone Law in Three Cities in Massachusetts*, report by Join Together, Boston University School of Public Health, 2001, published with additional literature review and statistical analysis under same title in *Journal of Drug Issues* 34(4), 933-949 (2004).

Brownsberger, WN. 2001. "Drug Users and Drug Dealers," in *Drug Addiction and Drug Policy*, Philip B. Heyman and William N. Brownsberger, ed., Harvard University Press, 2001.

Brownsberger, WN. 2000. "Race Matters: Disproportionality of Incarceration for Drug Dealing in Massachusetts," *Journal on Drug Issues*, 30(2): 345-374.

Brownsberger WN. Piehl AM. 1997. *Profile of Anti-drug Law Enforcement in Urban Poverty Areas in Massachusetts*, monograph published and distributed by the Robert Wood Johnson Foundation Substance Abuse Policy Research Program, November 1997.